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No. 08-82

In The
Supreme Court of the United States

IMS ENGINEERS - ARCHITECTS, P.C.,
Petitioner,

v.

PETE GEREN, SECRETARY OF THE ARMY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

JOSEPH A. CAMARDO, JR.
Counsel of Record
CAMARDO LAW FIRM, P.C.
127 GENESEE STREET
AUBURN, NEW YORK 13021
Tel: (315) 252-3846
Fax: (315) 252-3508

Attorney for Petitioner

July 11, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

1. Does the Contract Disputes Act give the Armed Services Board of Contract Appeals jurisdiction over claims of bad faith or improprieties in the award of task orders under an awarded Federal Government Indefinite Delivery/ Indefinite Quantity contract?

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

RULE 29.6 STATEMENT

IMS Engineers-Architects, P.C. is an New York Professional Corporation. No publicly held corporation owns any of the stock of IMS Engineers-Architects, P.C.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner IMS Engineers- Architects P.C. ("IMS") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federals Circuit in this case.

OPINIONS BELOW

The opinion of the Armed Services Board of Contract Appeals ("ASBCA") is reproduced in Appendix A. The opinion of the Armed Services Board of Contract Appeals on IMS's Motion for Reconsideration is reproduced in Appendix B. The opinion of the Court of Appeals for the Federal Circuit is reproduced in Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on April 14, 2008 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS

This case involves provisions of the Contract Disputes Act, 41 U.S.C. §§ 601-13. Pertinent statutory provisions and administrative materials are included in Appendix D.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

IMS was certified as a socially and economically disadvantaged 8(a)[1] business by the United States Small Business Administration ("SBA"). IMS provides architect-engineering services for Hazardous, Toxic, and Radioactive (HTRW) waste sites. Mr. Iqbal Singh is a Sikh from India and is the founder of IMS. A2[2]. On January 27, 1993, the Army Corps of Engineers Omaha District ("District") issued Request for Proposals ("RFP") No. DACW45-93-R-0055, for an Indefinite Delivery Indefinite Quantity (IDIQ) contracts for consulting services at miscellaneous HTRW sites. A3.

On August 4, 1994, the District awarded Contact No. DACW45-94-D-0049 ("Contract 0049") to the Small Business Administration ('SBA") with a subcontract to IMS pursuant to what is called a tripartite agreement. R56-57[3]. This IDIQ contract was for a one year period

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[1] "8(a)" refers to a Federal Government Contracting program whereby contracts are awarded on a sole source or limited competition basis to eligible small businesses owned by economically and socially disadvantaged minorities. See 15 U.S.C. § 637.

[2] "A2" refers to page 2 of the Appendix bound with this Petition for Certiorari.

[3] "R56" refers to page 56 of the Corrected Appendix before the United States Court of Appeals for the Federal Circuit, which is not bound with this Petition for Certiorari.

with four option years. A4. The minimum and maximum amounts of services available under the contract were $2,500.00 and $10,000,000.00. A4.

The contract required IMS to "perform all services" required "upon receipt of duly executed delivery orders" A4

This contract contained certain clauses specific to 8(a) contracts: I-31 (FAR 52.219-8), I.33 (FAR 52.219-11a), I-33 (FAR 52.219-11c), I.34 (FAR 52.219-12), I.36 (FAR 52.219-14), and I.37 (FAR 52.219-17). R62-78.

In February 1995, March Air Force Base, one of the District's customers, specifically asked that the District to award a contract to Black & Veatch Waste Science, Inc. ("B&V") for a treatablilty study at an abandoned gas station at March Air Force Base. B&V was a large business that had performed prior work at the site. A5. The Customer had substantial power in the issuance of delivery orders and any acquisition decision made by the District could be overridden by the customer canceling the requirement. R344.

On March 9, 1995, the District's Project Execution and Planning Board ("PEP Board") met to determine how the March Air Force project was to be conducted. The PEP Board was responsible for deciding how the District would fill various customer requests. A5. The District was behind on its small business goals, so the PEP Board decided to process this project through an 8(a) firm. A5. The PEP Board produced a "Memorandum for Record" indicating that "The treatability work at March AFB should be contracted

through an 8(a) contractor while maintaining continuity of the design in a timely manner." R92-94.

Iqbal Singh testified that On April 21, 1995, Mark Mercier, the Liaison Officer for IMS's Contract, spoke to him on the phone and told him that IMS had a "chance" of being awarded a delivery order for a treatability study at an abandoned gas station on March AFB if he agreed to subcontract 90 to 92 percent of the work to B&V. A6.

On May 1, 1995, under IMS's existing IDIQ contract, the District issued IMS a Request for Proposals ("RFP") for a treatablilty study at March Air Force Base, for a six month study using two "innovative technologies," soil washing and low thermal desorption. A7.

On or about May 9, 1995, IMS began negotiations with B&V to use B&V as a subcontractor for the work at March AFB. A7.

On June 5, 1995, B&V's Project Manager wrote to IMS. The language of this letter was quoted in the ASBCA decision as follows:

> [A]s you know, we . . . had discussions with the Omaha District regarding work at [the site] for several months prior to issuance of the [RFP]. It is our understanding that IMS will provide program management and QA/QC oversite [sic]. . . and [that B&V], as subcontractor to IMS, will provide all onsite, reporting, and related services. . . [B&V] will also be responsible for contracting with. . .

> subcontractors . . . Our proposal to you is based on this understanding. (emphasis added). A7, 8.

A portion of this same letter, not cited in the ASBCA's decision, stated that "If you question the acceptability of our labor rate basis or markup for this work by the District, I suggest you ask Mr. Linbrunner[4], or the contract officer, if these changes and rates are acceptable. It is my understanding that these rates will be acceptable to District; however, if they are not, we are open to negotiation." (emphasis added) R97-98.

On July 24, 1995, the District issued Delivery Order 0003 ("DO 0003") to IMS in the amount of $932,828, under IMS's current IDIQ contract. A5. The notice to proceed ("NTP") was issued on July 27, 1995. A8. At the time the Delivery Order was issued, IMS and B&V did not have a signed sub-contract, and IMS and B&V negotiated the terms and conditions for entering into a subcontract through August 21, 1995. A8. Negotiations between IMS and B&V "stalled" and the ASBCA found that IMS and B&V did not enter into a subcontract. A9.

On October 24 and 26, 2005, Singh attempted to renegotiate DO 0003 with the District, so that IMS could perform 100% of the work. A9. The District disagreed with IMS regarding the negotiation of certain costs, and attempted to cut off the negotiations,

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[4] Mr. Linbrunner was the "Technical Manager" for March Air Force Base. A5.

rather than splitting the difference as suggested by Singh. A9-10. The ASBCA found that Singh then stated that he would agree to any costs that the Government thought fair and reasonable. A9-10. Singh accepted the prices proposed by the Government. A10. However, the ASBCA found that "the parties did not reach agreement to modify DO No. 0003." A10.

In any case, IMS followed up by transmitting to the Corps a typed acceptance memorializing the agreed upon numbers, proposing to do the work at a cost of $885,173, a savings of approximately $57,000 from the earlier proposal involving B&V that had been accepted by the Corps. R120-123. The cover letter to this acceptance stated "[i]f you believe the re-negotiated numbers should be different/lower as per your assessment, those numbers will be acceptable to us." A10. The District did not formally respond. A10.

On November 6, 1995, the Environmental Coordinator for March AFB requested the District to terminate DO No. 0003 for the convenience of the Government, since "The Delivery Order was awarded in July 1995 and no work has been accomplished. . . we still require this project to be accomplished in FY 96 and suggest utilizing your $20M Indefinite Delivery Contract with Fluor Daniel Inc." A10.

On November 9, 1995, the technical manager for March AFB requested in a memo that the District terminate DO No. 0003, supposedly since a "recent Lawrence Livermore Report" indicated that the lower cost method of bioventing could be used instead of low temperature thermal desorption or soil washing. A11.

Biogas venting was in fact not a "recent" method but was available prior to 1995. A11.

On February 20, 1996, the Deputy Chief of the District's HTRW Branch, transmitted a request for proposals to Fluor Daniels for the work covered by DO 0003. R126. On March, 28 1996, the District issued a delivery order to Fluor Daniels in the amount of $615,332. R127. The delivery order required Fluor Daniels to perform a treatability study at the gas station on March AFB, using the method of biogas venting. Fluor Daniels subcontracted 80 percent of the work to B&V, the contractor originally requested by March Air Force Base. A11.

Contracting Officer Haskell terminated DO No. 0003 for the convenience of the government on May 2, 1996. The stated reason in the letter was:

> "Re-negotiations of the delivery order were conducted utilizing IMS personnel versus Black and Veatch personnel were accomplished. However, over the course of time, the original requirement for the work to be accomplished at the site changed significantly, making the treatability study unnecessary. Execution of work has not been accomplished, therefore it is considered to be in the Governments best interest to terminate the delivery order in its entirety." R128-129.

Despite repeated calls and letters to District Personnel, IMS was never awarded any more task orders under its ID/IQ contract after the termination of DO 0003. R311-312. On October 1, 1997, the

District advised Appellant that it would not exercise the third option year of IMS's ID/IQ contract, allegedly due to insufficient work load. A13.

It was revealed during the ASBCA hearing that the failure to issue more work was linked to a belief among Corps personnel that IMS has been deficient in its performance under DO 0003. Contracting Officer Haskell testified that he felt "let down" and "disappointed" in IMS and that the District Project Managers had to "literally make excuses for IMS to their client" for their supposed failure to timely complete DO 0003. R362-364. He agreed that his disappointment with IMS was substantially based upon his belief that a notice to proceed had been sent to IMS after the re-negotiation, which turned out to be not the case. R363. Under questioning, Haskell stated "I apologize for having the wrong information" and "again I apologize" and confirmed that his information was faulty regarding IMS's supposed failure to progress its work. R366-368.

Colonel Voltz, Commander of the Omaha District of the Corps, stated that the reason why no more delivery orders were issued to IMS "was mainly a situation of need and also a situation of customer preference and customer demand," (R256) (emphasis added). Voltz then stated that "Based on conversations with my project managers" he felt that "The performance [of IMS] was not to the standard that people would have liked to have seen." R257. Voltz went on to state that IMS had "caused their chief customer at the base to question their ability to get the work done in the period of time in which it was to be accomplished." R258. Once again, Colonel Voltz testified that his

belief was based upon "the verbal testimony of the people I worked with." R259.

Colonel Voltz, also testified regarding ill feeling about 8(a) contractors: "I would say that in most cases where an 8(a) contractor is brought in to an installation that's used to dealing with big business, they're always - - I shouldn't say always, but they're frequently very skeptical about that, and it's frequently because of the 8a program that the Corps decides to do this, and when it is done, it is typically at the objection of the installation. So that's not a unique case for IMS. I think that is something that many of our 8(a) contractors face." (emphasis added) R266.

More testimony before the ASBCA also revealed that 8(a) contractors were under a stigma. According to testimony by Contracting Officer Haskell, reproduced in the ASBCA's decision:

> Q [In your deposition you stated there was a] stigma associated with an 8(a) contract.
>
> A. In certain environments, yes.
>
> Q. Tell us about that and how you perceive that.
>
> A. I find [that] selling an 8(a) to a customer is somewhat trying. . . I have no control over it. Only [the customers] have control over that. . . All I can do as a contracting officer and someone within the acquisition process knowing full well how important the 8(a) program is we have to sell that to our customer in some, maybe many, instances.

That may be an easy sell and it may be a very difficult sell.

JUDGE TUNKS: What do you mean [by that]?

Mr. Haskell: [The] thing. . . is. . . we're dealing with a customer and if they choose not to come to us, [they don't have to]. A6.

Contracting Officer Haskell also testified that the District had insufficient work to warrant exercising the options and that the decision to not exercise the options was a business decision. A13. However, Singh testified that Voltz had told him "there is never a shortage of work" in the District. R315.

In 1995, the total amount of environmental contracts awarded by the District was $43,000,000 and by 1998 it was $267,000,000, which was a consistent increase in work. In 1997, the year that there was supposedly insufficient work to justify the continuation of the IMS contract, new 8(a) contracts of $5,000,000, $10,000,000 and $20,000,000 were awarded. R80-82.

Government documents in the record clearly indicated that IMS had consistently received superior performance reviews. An internal District memo regarding IMS's work on the Lincoln AFB, dated May 5, 1997 stated "This is one of the best QCSRs I have ever seen. The data validation is very thorough." A Fax transmittal from the District to IMS dated May 27, 1997 stated: "Nice report. . ." and the enclosed comments stated "Another quality and professional report submitted by IMS for USACE review. Keep up the good work!" Kevin Mayberry, Chief of Surveys

Mapping and GIS, wrote in regards to IMS's work at the Atlas Missile Site at Lincoln Air Force Base: "IMS performed very well for us on this project, a very responsible, responsive firm." The project manager for IMS's work at the Fuel Hydrant System at Seymour Johnson Air for Base noted that IMS's work was completed on schedule, completed within budget, and of satisfactory quality. In a letter dated August 23, 1996, Smart, Deputy Chief of the District's HTRW Branch stated "Your staff should be complimented on the fine research, work, and professional efforts on the D.O. tasks." R100-106. Contracting Specialist Overgaard confirmed that she had heard that IMS did very good work in the field. R324. More positive comments from other Districts are included at R107-111.

II. LOWER COURT PROCEEDINGS

On May 2, 2000 IMS submitted to the Contracting Officer a Request for Equitable Adjustment ("REA") seeking $5,773,760 from the Government pursuant to Contract 0049. This REA was denied by the Contracting Officer on September 18, 2000. On November 22, 2000 IMS filed a complaint against the United States with the ASBCA.

On May 14, 2001, the ASBCA dismissed the appeal for lack of jurisdiction because the Claim was not certified when it was submitted to the Contracting Officer. On July 17, 2001, Appellant requested the Contracting Officer to reconsider the Claim (then certified) and the September 18, 2000 final decision. On July 30, 2001, Appellant appealed the deemed denial of its claim. The appeal was docketed as ASBCA

No. 53471 on August 1, 2001. On August 8, 2001, the Contracting Officer refused to reconsider the final decision, and the matter proceeded to trial before the ASBCA.

In its trial before the ASBCA, IMS argued that it had been the victim of bad faith and racial discrimination, leading to the termination of Delivery Order 0003, and the failure to exercise the options years on its contract. As part of this bad faith scheme, IMS alleged that it had been expressly directed by the Corps to use B&V as a subcontractor, and alleged that when it had failed to do so, the Corps has retaliated by terminating DO 0003, by failing to issue further task orders to IMS, and by refusing to exercise the options under IMS's contract. IMS also argued that the Corps used improper and discriminatory practices in the issuance of task orders, leading to the Corp's failure to issue additional task orders to IMS under Contract 0049 after the termination of DO 0003.

On March 9, 2006, the ASBCA issued a published opinion and order, granting judgment in favor of the Government. With regards to IMS's arguments regarding the termination of DO 0003 and the failure to exercise the options on its contract, the ASBCA found that IMS did not prove bad faith. However, with regards to IMS's task order selection argument, the ASBCA claimed to lack jurisdiction, stating that: "Section 605(a) of the Contract Disputes Act (Act), 41 U.S.C. §§ 601-13 limits our jurisdiction to claims 'relating to a contract.' As a result, we lack jurisdiction over allegations of irregularities in the selection process and misuse of IDIQ contracts. These issues are reserved for other fora." A17.

IMS filed a Motion for Reconsideration before the ASBCA focusing primarily on erroneous findings of fact in the ASBCA decision, and pointing out overlooked evidence. This Motion for Reconsideration was denied on December 27, 2006. A26-33.

IMS proceeded to appeal to the United States Court of Appeals for the Federal Circuit, asserting both factual and legal error. IMS expressly raised the point that the ASBCA's failure to consider "allegations of irregularities in the selection process" on jurisdictional grounds was error.

In its decision of April 14, 2008 the Court of Appeals for the Federal Circuit affirmed the decision of the ASBCA without opinion. A34-35. As will be explained below, this disposition by the Federal Circuit leaves important questions unresolved regarding the jurisdiction and powers conferred by the Contract Disputes Act, as it relates to a contractors due process for contesting unfairness under an existing ID/IQ contract and the split of authority between the Boards of Contract Appeals and the United States Court of Federal Claims. These questions have applicability to the entire Federal Government Procurement system.

REASONS FOR GRANTING THE PETITION

The Lower Courts' claim that they lack jurisdiction would deny all review of task order issuance under an existing ID/IQ contract and would deny IMS its due process. It is no exaggeration to state that the decisions below would essentially give the Government an absolutely free hand to deny or grant task orders at will based on their subjective desires, and would allow

informal "blackballing" of Federal Government contractors without notice or right to be heard. Considering the ever increasing prevalence of the ID/IQ system in Federal Government contracting, the decision of the Courts below takes on a dire significance as an enabler of waste and fraud, as well as a grievous violation of procedural due process. It is for these reasons that IMS respectfully brings this matter to the attention of the United States Supreme Court.

It should also be noted that the law in this area is highly unsettled, with some United States Federal Court of Claims and Armed Services Board of Contract Appeals decisions in direct conflict with the decision in the current case, and some in seeming agreement. It was the hope of IMS that the issue would be addressed in the decision of the Federal Circuit, but the Federal Circuit elected to affirm without opinion. Considering the importance of this question to the entire Government procurement system, it is submitted that this conflict should be resolved conclusively and decisively by this Court.

I. THIS CASE RAISES IMPORTANT ISSUES OF LAW REGARDING REVIEW OF TASK ORDER SELECTION UNDER THE CONTRACT DISPUTES ACT

Before the questions in this case may be intelligently discussed, it is essential to understand the nature of Indefinite Quantity/ Indefinite Delivery (ID/IQ) contracting. 48 C.F.R. 16.504 establishes the ID/IQ task order contracting method:

"(a) Description. An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period. The Government places orders for individual requirements. Quantity limits may be stated as number of units or as dollar values.

(1) The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor must furnish any additional quantities, not to exceed the stated maximum. The contracting officer should establish a reasonable maximum quantity based on market research, trends on recent contracts for similar supplies or services, survey of potential users, or any other rational basis."

As can be seen from the above language, once the minimum quantity is ordered, an ID/IQ contract functions as a sort of "shell," under which more work may or may not be issued by the Contracting officer. 48 C.F.R. 16.504 (c) (1) (i) also encourages the simultaneous award of multiple ID/IQ contracts to several contractors: "the contracting officer must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources."

Taking these provisions together, ID/IQ contracting can be fairly described as a system where the contracting officer issues a number of ID/IQ contracts to different contractors for a certain category of work,

such as environmental remediation. As a job arises that need to be completed, the Contracting Officer issues a task order under one of the awarded ID/IQ contracts. While this task order is akin to the award of a free standing contract, notice and competition requirements are substantially relaxed. First of all, standard notice requirements do not apply, and are"... not required for issuance of a task or delivery order under a task or delivery order contract ...." 41 U.S.C. § 253j(a) (2005). Normal procurement competition requirements are replaced by a requirement for a "fair opportunity" to compete. 41 U.S.C. § 253j(b) (2005). However 10 U.S.C. § 2304c (d) removes the ability to file bid protests in most circumstances, and leaves "fair opportunity" enforcement to an agency "ombudsman."

Both the prevalence of the ID/IQ system and its flaws have attracted significant commentary. In fact, the relatively new method of ID/IQ contracting has largely supplanted the traditional methods of Government acquisition. Some of the leading experts in government contracting, Professors Nash and Cibinic have noted that "[t]he major 'acquisition reform' at the end of the 20th Century turned out to be the huge shift to the use of task order instead of new contracts for obtaining services. Almost all major procuring agencies appear to have made this 'reform,' although the approaches have varied. . . Whichever technique is used, there are requirements for competition in issuing such task orders and there are numerous indications that Contracting Officers are diligent in finding ways to avoid such competition." 18 No. 10 Nash & Cibinic Rep. ¶ 42. Accordingly, the issues in the instant case have wide applicability

throughout the entire spectrum of Federal Government Contracting.

To compound matters even further, the IMS ID/IQ contract was a set-aside into the SBA's 8(a) program and as such it is submitted that any work that was contemplated under the agreement would be set aside into that program. The Federal Acquisition Regulations allow for withdrawing or modifying a small business set aside, but only before the award (See FAR 19.506)

It should be noted that IMS's concerns regarding jurisdiction over task order selection are not merely academic in nature. While the written decision of the ASBCA did not consider irregularities in the task order selection process, certain comments made on the record by the ASBCA judge indicated that had such issues been considered, the result could well have been favorable for IMS. These extraordinary comments are worthy of extensive review, and may be found at pages R343 to R357. These comments include:

> Here is another concern that I have. You know, one of the premises of Government contracts is that there be competition, that there be full and open competition. This contracting scheme, this ID/IQ scheme where everybody issues different ID/IQ contracts to me is just an easy way of getting around the requirement to compete and to look at such legal considerations as 8(a) contractors. . .
>
> I don't see - - I don't know anything about ID/IQ contracts but I will shortly. I don't understand how you could - - I know its not you

personally. You're just doing your job. I understand that, but I have a problem with that because what it allows is for there to be a completely secretive selection for task orders. . .

It seems like these criteria are kind of flexible. I think that's what I object to. It's flexible and it's secret. I can't lay it in my hands and see what it is, one, two, three, four, five that this contractor has to do to get a contract. I can't do that. . .

So, in essence, this particular contracting office can do anything they want without regard of the requirements such as 8(a) or full and open competition if they want to. And if they don't want to, they don't have to. I may be reading all this, and I'm sure that Towson [the identity of "Towson" is unclear from the record] is going to tell me.

I'm sure I'm going to hear about all this but I've been sitting here turning this over in my mind and I don't see how one can justify this scheme based on what I know about Government contracts. . .

Well, you all may be able to show me that I'm totally all wrong which is entirely possible. Honestly I don't know anything about ID/IQ contracts but I do know I'm sitting here listening to this and I'm going 'Excuse me? How can this be.' We have statutes that govern how contracts are used.

This permits the using activity to do anything they want just like that. Now, I may be wrong. . . R343-357. (emphasis added).

After the ASBCA Judge aired these concerns, Appellant's attorney further illustrated the point that the Corps wished to use IMS's contract capacity to funnel work to selected large business, by reading from an "audit report" that had been entered into evidence:

> The proliferation of large ID/IQ contracts has reduced United States Army Corps of Engineers Small Business contract award opportunities. . . Six contractors (four large businesses) were awarded 70 delivery orders in the amount of $10.125 million. Three of these contractors, two large businesses, accounted for 63 which is 98 percent of the delivery orders and $8.838 million, 87 percent of the buyers. . . Also, USACE's compliance with the competition in contracting and Small Business Investment Act are adversely affected." R355-356.

When asked "Now, those comments and observations seem to be consistent with what your Honor was just talking about", Judge Tunks replied "Yes." R356

However, these issues were ignored in the ASBCA's written decision. The ASBCA avoided the issue by stating at page 10 that "Section 605(a) of the Contract Disputes Act (Act), 41 U.S.C. §§ 601-13 limits our jurisdiction to claims 'relating to a contract.' As a result, we lack jurisdiction over allegations of irregularities in the selection process and misuse of IDIQ contracts. These issues are reserved for other fora." A17.

While stating that "these issues are reserved for other fora," the ASBCA did not indicate what these "other fora" were, and Appellant is sincerely unaware of any other "fora" that is available to it for the advancement of its claims regarding task order selection, other than the ASBCA or the United States Court of Claims, which have jurisdiction over "all contractor claims based upon a valid contractual theory." LaBarge Products, Inc. v. West, 46 F.3d 1547, 1554 (Fed. Cir. 1995).

Generally, parties have a right to contest procurement actions before the issuance of a contact. However, an anomaly exists in ID/IQ contracting because an ID/IQ contract is first issued as a shell contract and then the Government places task orders against that contract. 10 U.S.C. § 2304c (d) expressly states that "A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order . . ." Thus, in most circumstances, a bid protest action seeking to set aside the task order award is not allowable for task order selection decisions. Weeks Marine, Inc. v. U.S., 79 Fed. Cl. 22, 24 (2007); A & D Fire Protection, Inc. v. U.S., 72 Fed. Cl. 126, 133 (2006). Thus, to the extent that the ASBCA may have been suggesting that IMS could have taken a bid protest to the United States Court of Federal Claims, rather than a Contract Disputes Act Claim, the ASBCA is mistaken.

However, some Boards of Contract Appeals have recently recognized after an ID/IQ contract has been issued, a contractor has some rights under the shell contract to seek due process by maintaining a cause of action under the ID/IQ contract. Even if the

Government has satisfied its burden by purchasing the minimum amount under the contract, the contractor should be able to seek breach of contract damages stemming from a lack of fair consideration on task order awards. In the case at bar, IMS contended that it was not being fairly considered for addition task orders beyond DO 0003, but the ASBCA refused to hear this argument based on a lack of jurisdiction. Essentially, the ASBCA is setting a dangerous precedent by giving the government an unbridled license to do whatever it wants under a small minority business program that is designed to help contractors, not hurt them.

IMS was not the first contractor to face the dilemma of how to obtain review of problems or irregularities in task order selection, and several cases exist on this point. Unfortunately, these cases appear to be in direct conflict, and do not propound a clear rule of law. By affirming without decision, the Federal Circuit left the confusion unresolved.

In Burk Court Reporting Co., DOTBCA No. 3058, 97-2 BCA ¶ 29,323, the Board acknowledged that a contractor could maintain a cause of action after the Government ordered the minimum quantity and that while an indefinite quantity clause of the contract only obligates the Government to order the minimum stated service, the contractor could maintain a cause of action for breach of contract based on the government lack of fair consideration on task order awards.

Appeal of Community Consulting International 02-2 BCA P 31940 was also one of the first cases to

indicate that Contract Disputes Act Jurisdiction extended to problems in the issuance of task orders. Similar to IMS, the Appellant in Appeal of Community Consulting International alleged that its ID/IQ contract had been breached by the Government's failure to provide a fair opportunity to compete for task orders. The Government moved for summary judgment, on the grounds that the Appellant's cause of action was essentially a bid protest of an ID/IQ task order, and was thus barred under 10 U.S.C. § 2304c(d). However, the Community Consulting Court held that "These allegations fall within the classic elements of non-performance of a contractual duty, resulting in damages. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 235(2), 236 (1979). As such, they fall within our Contract Disputes Act breach jurisdiction, which embraces disputes "relating to a contract.' 41 U.S.C. § 605(a); see Malone v. United States, 849 F.2d 1441, 1444 (Fed. Cir. 1988) (noting that the Act expanded boards' jurisdiction to include "breach of contract issues"). We do not understand the allegations of count one to constitute, in the formulation of 31 U.S.C. § 3551(1)(C), an objection 'to ... [a]n award or proposed award of. .. a contract,' to either of the two additional awardees. Instead, the allegations regarding the additional awards lay out what are said to be the contractual consequences that have ensued from respondent's failure to adhere to promises made in appellant's contract."

In the more recent case of In re L-3 Communications Corp., ASBCA No. 54920 (2006) the Armed Services Board indicated even more clearly that such claims were covered by the Contract Disputes Act:

> The same actions of the government in awarding a delivery order under a multiple award indefinite quantity contract may theoretically be grounds for both a "protest" seeking to cancel or modify the award and a "claim" for damages for breach of the Awarding Orders clause of the contract. These are separate and distinct forms of relief with "protests" governed by FAR Subpart 33.1 and "claims" by FAR Subpart 33.2. The statute, regulation and contract clause prohibit only protests. Link's certified claim for money damages for breach of the Awarding Orders clause does not seek to cancel or modify the award made. The denial of that claim by the contracting officer is within our jurisdiction under the CDA, FAR Subpart 33.2 and the FAR 52.233-1 DISPUTES (DEC 1998) clause of the contract.

The United States Court of Federal Claims has also issued three decisions on the question; however, the decisions are in conflict, with two decisions supporting review and one denying it. A&D Fire Protection, Inc. v. United States, 72 Fed. Cl. 126 (2006) stated:

> "First, the court reads the task order bid protest bar of 41 U.S.C. § 253j(d) to squarely deny the right of plaintiff to contest, in this court, the project's award to intervenor-defendant. Second, as a general matter, the court does not agree with the theory that actions, that are in essence bid protests of task order awards, can be re-characterized as contract disputes in order to create jurisdiction in this court or in an agency

> board of contract appeals. But see Ralph C. Nash & John Cibinic, Task Order Contracts: The Breach of Loss of the Fair Opportunity to Compete, 16 No. 10 Nash & Cibinic Report 49 (Oct.2002) ("Taking a case to the agency board of contract appeals appears to be a viable way to contest the lack of a fair opportunity to compete for task orders.")."

In contrast, in L.P. Consulting Group, Inc. v. United States, 66 Fed. Cl. 238 (2005), the Court of Federal Claims suggested that a failure to give a contractor a fair opportunity to compete for task orders is synonymous with breach of the implied duty of good faith and fair dealing, and thus can support a CDA claim: "plaintiff argues that the defendant breached not one, but two duties: first, an asserted duty to give plaintiff a fair opportunity to compete for the projects in question and the second, the implied duty of good faith and fair dealing. In the court's view, these duties are two sides of the same coin and should be analyzed in kind."

Further confirmation that jurisdiction exists is provided by ABF Freight System, Inc., v. United States, 55 Fed. Cl. 392 (2003). In dismissing a post award bid protest by parties who had been successful in obtaining a contract, the ABF Court noted:

> The court does not see how a plaintiff asserting claims pertaining to a contract it has made with the government could be a "disappointed bidder" for bid protest purposes. See Davis/HRGM Joint Venture v. United States, 50 Fed.Cl. 539, 545 (2001) (citing Ingersoll-Rand

> Co. v. United States, 780 F.2d 74, 77-80 (D.C.Cir.1985)). Rather, such a plaintiff is a contractor asserting a claim "relating to a contract" and is subject to the Contract Disputes Act jurisdiction of this court, as set forth in 41 U.S.C. § 609. See Davis/HRGM Joint Venture, 50 Fed.Cl. at 545 (citing Ingersoll-Rand Co., 780 F.2d at 77-80); Cmty. Consulting Int'l, ASBCA No. 53,489, 02-2 B.C.A. ¶ 31,940, 2002 WL 1788535 (2002).

It should further be noted that the well known Professors Nash & Cibinic have also explored the unclear and divided law regarding the possibility of basing a Contract Disputes Act claim on complaints regarding task order suggestion. See TASK ORDER CONTRACT: THE BREACH OF LOSS OF THE FAIR OPPORTUNITY TO COMPETE, 16 No. 10 Nash & Cibinic Rep. P 49; COMPETITION FOR TASK ORDERS: THE EXCEPTION OR THE RULE? 18 No. 10 Nash & Cibinic Rep. 42; POSTSCRIPT: BREACH OF LOSS OF THE FAIR OPPORTUNITY TO COMPETE 20 No. 12 Nash & Cibinic Rep. 59. Another noted publication to address this issue can be found at CONQUERING UNCERTAINTY IN AN INDEFINTE WORLD: A SURVEY OF DISPUTES ARISING UNDER IDIQ CONTRACTS 37 Pub. Cont. L.J 415.

Under the facts of the current case, the ASBCA dismissed IMS's claims that it was not fairly considered for additional work outright based on a lack of jurisdiction. So it cannot be argued that the merits of IMS's claim were ever reached. This is despite the evidence in the record that the Government was

mistaken about the facts surrounding DO 0003 and the lack of work. The Contracting Officer apologized for having the wrong facts and the record shows that there was an abundance of work with the Omaha District.

IMS is cognizant of the fact that this Court restricts itself to questions of national importance, and in that regard, IMS respectfully draws this Court's attention to Weeks Marine, Inc. v. U.S., 79 Fed. Cl. 22 (2007), whereby the Court of Federal Claims discoursed upon the "disturbing" nature of the present ID/IQ contracting system:

> A disturbing feature of SAD's new procurement method is that approximately $2 billion in task order awards during the next five years would become virtually immune from any judicial or administrative bid protest review. . . The Court does not regard a Corps of Engineers "ombudsman" procedure included in the solicitation, Administrative Record ("AR") 98, as a viable substitute for the judicial or administrative bid protest review that currently exists for sealed bidding. Under the "ombudsman" procedure, the review is confined to the Corps of Engineers, at either the Contracting Officer or the ombudsman level.

As Weeks was a bid protest action, that case did not directly give rise to the question of whether a holder of an awarded Federal Government Contract could use the Contract Disputes Act to remedy unfair treatment in task order selection. However, the discussion in Weeks certainly does underline the seriousness of the

issues surrounding ID/IQ contracting, and highlights the public interest at stake in this case.

Finally, another way to look at the issue of the selection process improprieties is that these improprieties were a breach of the 8(a) clauses of IMS's contract, and thus they also come under the ASBCA's jurisdiction as a claim relating to a contract.

Contract Clause 1.31 (F.A.R. 52.219-8) of IMS's Contract 0049 states that:

> It is the policy of the United States that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in performing contracts let by any Federal agency. . . R69.

IMS was awarded its IDIQ contract under the above policy. However, IMS asserted that it was actually denied a fair opportunity to receive task orders under its awarded contract. Thus, the ASBCA decision that the Contracts Disputes Act did not give jurisdiction over the allegation of irregularities in task order selection is doubly troublesome.

CONCLUSION

It is no exaggeration to state that this case has starkly revealed questions of massive public importance, and has exposed a significant unanswered question regarding the entire Government procurement system. IMS's contract was issued under

a minority set-aside program which is aimed to help the contractor and not to hurt them. The decision of the Lower Court gives the Government unbridlded rights to place orders with large business ID/IQ contractors without fairly considering IMS, thus removing the work from the entire 8(a) program. The ASBCA claims that it has no jurisdiction over government actions under an existing ID/IQ contract, including the failure to properly consider IMS for additional work. It is respectfully submitted that these questions are worthy of and merit review by the Supreme Court of the United States.

Dated: July 11, 2008

Camardo Law Firm, P.C.

Joseph A. Camardo, Jr.
Counsel of Record
127 Genesee Street
Auburn, New York 13021
Tel: (315) 252-3846
Fax (315) 252-3508

Attorney for Petitioner

APPENDIX

APPENDIX A

ARMED SERVICES BOARD OF CONTRACT APPEALS

ASBCA No. 53471

[Dated March 10, 2006]

Appeal of –	)
	)
IMS Engineers - Architects, P.C.	)
	)
Under Contract No. DACW45-94-D0049	)
	)

APPEARANCE FOR THE APPELLANT:
Sam Z. Gdanski, Esq.
Suffern, NY

APPEARANCES FOR THE GOVERNMENT:
Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Thomas J. Ingram, Esq.
Engineer Trial Attorney
U.S. Army by Engineer District, Omaha

OPINION BY ADMINISTRATIVE JUDGE TUNKS

Appellant seeks $6,663,171 for breach of contract, alleging that the government terminated delivery order (DO) No. 0003 and failed to exercise the last two

option years of the subject indefinite delivery (IDIQ) contract in bad faith. The appeal was docketed under the name of IMS P.C. Environmental & Engineering. Appellant has since changed its name to IMS Engineers - Architects, P.C. The caption has been amended to reflect the change. Only entitlement is at issue.

FINDINGS OF FACT

1. The Small Business Administration (SBA) certified appellant as a socially and economically disadvantaged 8(a) business on 23 December 1985. The firm provides architect-engineering services for hazardous, toxic and radioactive waste (HTRW) sites (R4, tab 18 at 2; app. supp. R4, tab 128 at SBA letter dated 13 February 1986). Mr. Iqbal Singh, appellant's founder and president, is from India and is a Sikh (tr. 2/159-60).

2. After founding IMS P.C. Environmental & Engineering in 1981, Mr. Singh aggressively marketed his firm to the United States Amy Corps of Engineers (Corps). He submitted "innuerable" proposals to the various districts within the Corps, talked to Corps personnel and attended numerous small business and HTRW seminars. Mr. Singh was particularly interested in obtaining a contract from the Omaha District (district). (Tr. 1/164, 188-89)

3. After an HTRW seminar in November 1992, Mr. Singh complained to Colonel John E. Schaufelberger, Division Engineer for the Missouri River Division (which included the Omaha District), that he had been unable to obtain a contract (app. supp. R4, tab 91; tr. 191-93).

4. On 27 January 1993, the district issued Request for Proposals (RFP) No. DACW45-93-R-0055 requesting appellant through the SBA to submit a proposal for an indefinite delivery (IDIQ) contract for consulting services at Miscellaneous Military and Civil HTRW Sites (app. supp. R4, tab 128, SF Form 255).

5. The RFP included the following clauses that are pertinent to this appeal:

> FAR 52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989)
>
> (a) The Government may extend the term of this contract by written notice to the Contractor within sixty (60) days. . . .
>
> . . . .
>
> FAR 52.219-14 LIMITATIONS ON SUBCONTRACTTNG (JAN 1991)
>
> . . . .
>
> (b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for - -
>
> (1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.
>
> . . . .

FAR 52.249-7 TERMINATION (FIXED-PRICE ARCHITECT-ENGINEER) (APR 1984)

(a) The Government may terminate this contract . . . for the Government's convenience or because of the failure of the Contractor to fulfill the contract obligations. . . .

(b) If the termination is for the convenience of the Government, the Contracting Officer shall make an equitable adjustment in the contract price but shall allow no anticipated profit on unperformed services.

(RFP at I-31, I-39, I-120)

6. Appellant's Statement of Qualifications identified Woodward-Clyde Federal Systems (Woodward-Clyde) as its subcontractor and represented that appellant would perform 60 to 75 percent of the work with its own forces (tr. 1/208-13; app. supp. R4, tab 128 at 3).

7. On 5 August 1994, the district awarded IDIQ Contract No. DACW45-94-D-0049 to appellant. The contract was for a term of one year with four option years. The minimum amount of services that could be ordered was $2,500 and the maximum amount of services, including the four option years, was $10,000,000. (App. supp. R4, tab 132)

8. The contract required appellant to "perform all services" required "[u]pon receipt of duly executed delivery orders" (app. supp. R4, tab 132 at block 6). The parties agree that, under this contract, the

executed delivery order (or task order) served as the notice to proceed (NTP) (tr. 1/233-34, 2/103).

9. In February 1995, the district awarded appellant delivery order (DO) No. 0001 in the amount of $158,627 for work at Seymour Johnson Air Force Base (AFB) and DO No. 0002 in the amount of $531,342 far work at Lincoln AFB (app. supp. R4, tabs 2, 3, 131 at 13; tr. 1/201-02).

10. At about the same time, March AFB, another one of the district's customers, requested the district to award a contract to Black & Veatch Waste Science, Inc. (B&V), for a treatability study at an abandoned gas station (tr. 1/29). B&V was a large business that had performed some investigative work at the site (app. supp. R4, tab 133 at 1; tr. 1/62, 215).

11. On 9 March 1995, the Project Execution Plan Board, the Board responsible for deciding how the district would fill various customer requests, met to determine how the treatability study would be procured. Since the district was behind in its small business goals, the Board recommended that the contract be awarded to an 8(a) firm. Among others, Mr. Deszo J. Linbrunner, the technical manager for March AFB, and Mr. John A. Haskell, Jr., the contracting officer, were on the Board (R4, tab 23; tr. 1/30, 65).

12. Mr. Haskell testified that, in many instances, the district's customers are reluctant to use 8(a) contractors:

> Q. [In your deposition you stated there was a] stigma associated with an 8(a) contract.

A. In certain environments, yes.

Q. Tell us about that and how you perceive that.

A. I find [that] selling an 8(a) to a customer is somewhat trying . . . . I have no control over it. Only [the customers] have control over that. . . . All I can do as a contracting officer and someone within the acquisition process knowing full well how important the 8(a) program is we have to sell that to our customer in some, maybe many, instances. That may be an easy sell and it may be a very difficult sell.

JUDGE TUNKS: What do you mean [by that]?

Mr. HASKELL: [The] thing . . . is . . . we're dealing with a customer and if they choose not to come to us, [they don't have to].

(Tr. 2/161-62)

13. Mr. Singh testified that on 21 April 1995 Mr. Mark Mercier, a technical manager in the district, called him and told him that appellant had a "chance" of being awarded a delivery order for a treatability study at an abandoned gas station on March AFB if he agreed to subcontract 90 to 92 percent of the work to B&V (tr. 1/204-05). In support of this assertion, appellant offered its telephone bill for April/May 1995, which shows a 2.1 minute call from Rochester, New York, appellant's place of business, to Mr. Mercier on

21 April 1995 (app. supp. R4, tab 116). Mr. Mercier did not testify.

14. Neither Mr. Mercier nor Mr. Linbrunner had contract authority (1/96-100).

15. On 25 April 1995, Mr. Singh told Mr. Mercier that he would perform the work (app. supp. R4, tab 116 at 277; tr. 1/207-14).

16. On 28 April 1995, Mr. Singh called Mr. Linbrunner and requested the names of potential subcontractors. Mr. Linbrunner gave Mr. Singh the names of four subcontractors, including B&V, and advised him that the information did not constitute a government directive to use any particular subcontractor (tr. 1/31, 253).

17. On 1 May 1995, the district issued an RFP for the treatability study. The RFP was for a six month treatability study using two "innovative technologies," soil washing and low thermal desorption (R4, tab 3).

18. On or about 9 May 1995, Mr. Singh began negotiations with B&V (tr. 1/238).

19. On 5 June 1995, B&V's project manager wrote appellant as follows:

> [A]s you know, we. . . had discussions with the Omaha District regarding work at [the site] for several months prior to issuance of the [RFP]. It is our understanding that IMS will provide program management and QA/QC oversite [sic] . . . and [that B&V], as subcontractor to IMS,

> will provide all onsite, reporting, and related services . . . . [B&V] will also be responsible for contracting with . . . subcontractors . . . . Our proposal to you is based on this understanding.

(App. supp. R4, tab 14)

20. On 28 June 1995, appellant submitted a proposal in the amount of $932,828 for the treatability study. The proposal indicated that B&V would perform $795,574, or 85 percent, of the total costs. (App. supp. R4, tab 129) Ms. Patricia Overgaard, the contract specialist for DO No. 0003, was aware that appellant planned to have B&V perform more than 50 percent of the work (tr. 2/100, 122). Ms. Overgaard did not distinguish between the total cost of the work and labor casts. As long as appellant performed 50 percent of the work by the end of the contract (as opposed to a particular task order), it was her understanding that FAR 52.219-14 LIMITATIONS ON SUBCONTRACTING (JAN 1991) would be satisfied. (Tr. 24/117-18)

21. On 24 July 1995, the district issued DO No. 0003 for the treatability study to appellant in the amount of $932.828 (R4, tabs 4, 5). The notice of award/NTP was telefaxed to appellant on 27 July 1995 (app. supp. R4, tab 19; tr. 1/232-34, 243, 2/102-103).

22. Appellant and B&V negotiated the terms and conditions for entering into a subcontract through 21 August 1995 (R4, tab 29; app. supp. R4, tabs 5-6, 14, 16, 18, 20-27, 32-36, 42; tr. 1/235-52).

23. During the negotiations with B&V, Mr. Linbunner received a call from B&V every day for three weeks as well as many calls from Mr. Singh (R4, tab 29; tr. 1/32-33).

24. When the subcontract negotiations stalled, Mr. Singh testified that Mr. Linbrunner told him that if he did not finalize the subcontract. "[he would] not get this task order [or] any work on this contract" (tr. 1/252-53). Mr. Linbrunner denied the exchange (tr. 1/88-89). We find Mr. Linbrunner's testimony more credible than Mr. Singh's.

25. Although Mr. Singh testified that he reached agreement with B&V on the terms and conditions of a subcontract, the subcontract was new executed. According to Mr. Singh, Mr. Hubert Carter, the SBA Advocate, reviewed the terms and conditions of the subcontract and told him not to sign it. (R4, tab 48; tr. 1/34, 264-65) Mr. Carter did not testify and there is no evidence corroborating Mr. Singh's testimony.

26. On 24 and 26 October 1995, the district reopened negotiations to modify DO No. 0003 to have appellant perform 100 percent of the work. Ms. Overgaard and Mr. Linbrunner represented the district and Mr. Singh represented appellant. The parties disagreed as to how the negotiations should proceed. Mr. Singh wanted to add the district's estimate to his estimate and split the difference, but the district rejected this method (tr. 1/37-42, 270-74, 2/141-42). When Ms. Overgaard attempted to break off the negotiations, Mr. Singh stated that he would agree to whatever costs Mr. Linbrunner thought were fair and reasonable (tr. 1/40). This was also unacceptable

(tr. 1/40-44, 2/105-06). When he left the negotiations, Mr. Singh testified that he thought the district had, in principle, agreed to his offer to accept whatever Mr. Linbrunner thought was fair and reasonable (tr. 1/277). On 31 October 1995, appellant submitted a written proposal in the amount of $885.173, stating that "[i]f you believe the re-negotiated numbers should be different/lower as per your assessment, those numbers will be acceptable to us" (emphasis in original) (app. supp. R4, tab 130). The district did not respond to appellant's proposal or modify DO No. 0003 (tr. 1/277-78, 2/220). On these facts, we find that the parties did not reach agreement to modify DO No. 0003.

27. On 6 November 1995, the BRAC Environmental Coordinator for March AFB requested the district to terminate DO No. 0003 for the convenience of the government:

> 1. March AFB would like the Delivery Order with IMS, Inc. . . . canceled for the "convenience of the U.S. Government." The Delivery Order was awarded in July 1995 and no work has been accomplished. . . . Since work has been delayed for almost four months, obviously the contractor will not meet our completion date of December 1995, ...
>
> 2. After careful review of this situation, we still require this project to be accomplished in FY96 and suggest utilizing your $20M Indefinite Delivery Contract with Fluor Daniel, Inc. . . . If

> this project is not accomplished in FY96, we will lose these funds . . . . (emphasis in original)

(R4, tab 6)

28. On 9 November 1995, Mr. Linbunner requested Ms. Overgaard to terminate DO No. 0003, stating as follows:

> Based on information contained in the recent Lawrence Livermore Report on petroleum-related contamination, the two innovative technologies, Low Temperature Thermal Desorption and Soil Washing, are no longer required. The use of Bioventing will produce the similar results, but at a much lower cost in this time of reduced funding.

(R4, tab 7)

29. Bioventing was available prior to 1995 (tr. 1/284-90).

30. On 28 March 1996, the district issued a delivery order to Fluor Daniel in the amount of $615,332. The delivery order required Fluor Daniel to perform a treatability study using bioventing at the gas station on March AFB. Fluor Daniel subcontracted 80 percent of the work to B&V. (App. supp. R4, tabs 122, 134)

31. The district terminated DO No. 0003 for the convenience of the government on 2 May 1996. The termination notice stated, in part, as follows:

> [O]ver . . . time, the original requirement [has] changed significa[ntly], making the treatability study unnecessary. Execution of work has not been accomplished, therefore, it is considered to be in the Government[']s best interest to terminate the delivery order in its entirety.
>
> At this time, we request, [that appellant] submit, . . . any costs that have been incurred in the preparation and submission of the cost proposals for this requirement.

(R4, tab 8)

32. On 15 May 1996, appellant indicated that it would not submit a termination settlement proposal (R4, tab 9). Appellant had not performed any work on the DO (tr. 1/279).

33. Ms. Overgaard testified that she did not terminate DO No. 0003 until 2 May 1996 because she had a protracted serious illness that impaired her ability to perform her job (tr. 2/110-12, 143). At the time, the contracting officer had 10 contract specialists working for him (tr. 2/155).

34. The district issued DO No. 0004 in the amount of $104,905 and DO No. 0005 in the amount of $171.899 to IMS on 26 and 30 September 1995 respectively (R4, tabs 39, 40).

35. After the termination, appellant filed a complaint with Corps Headquarters, alleging that the contract procedures used by the Huntsville, Baltimore, and Omaha Districts were discriminatory. On 31 July

1997, the Chief of the Audit Office issued Draft Audit Letter Report No. AOI 97-011-01. The final audit report is not in evidence. The auditor was unable to document any discriminatory contracting practices and found that the award, administration and termination of contracts in these districts generally complied with Army policy. The report stated that the district's implementation of the 8(a) program needed to be improved and that its use of IDIQ contracts was "not attuned with the spirit of the Competition in Contracting Law." The auditor also found that DO No. 0003 should have been processed as a no-cost termination for convenience. Although the auditor was unable to verify that appellant was directed to use B&V, she noted that Fluor Daniel subcontracted about 80 percent of the work to B&V. (R4, tab 18)

36. On 1 October 1997, the district advised appellant that it would not exercise the third option year and that its contract had expired on 4 August 1997 (app. sup. R4, tabs 82, 83). Mr. Haskell, the contracting officer, testified that the district had insufficient work to warrant exercising the options and that the decision to not exercise the options was a business decision (tr. 2/182-84). We find Mr. Haskell's testimony credible on this point.

37. After the termination, Mr. Singh contacted Mr. Gordon Hussey, who supervised the district's technical managers, on numerous occasions asking for more work (tr. 1/146-52). Mr. Hussey did not recall any specific project for which appellant was considered, but he was sure that appellant had been considered for other delivery orders because its IDIQ contract had not expired (tr. 1/151). Mr. Hussey knew there had been

"some difficulties" with the quality of appellant's work but did not know the specifics. He was not aware of any animus towards Mr. Singh or his firm and believed that the firm was treated in the same manner as other similarly situated firms (tr. 1/153-54). We find Mr. Hussey's testimony credible.

38. Mr. Singh subsequently complained to Colonel Robert D. Volz, the District Manager, that he was not receiving enough work. Mr. Singh attributed the lack of work to racial and ethnic discrimination and Mr. Hussey's refusal to give him more work (tr. 1/111-12, 144). Colonel Volz's investigation lasted approximately 1½ weeks and consisted largely of interviews performed by his subordinates. He concluded that appellant's "performance was not to the standard that people would have liked to have seen," but that the district was not withholding work on the basis of race, ethnic origin or the fact that appellant was an 8(a) business. Colonel Volz attributed appellant's failure to obtain more work as "mainly a situation of need and also a situation of customer preference and customer demands." No written report was prepared. (Tr. 1/112-16, 127)

39. On 2 May 2000, appellant submitted a request for an equitable adjustment (REA) to the contracting officer in the amount of $5,773,760 (R4, tab 19).

40. The contracting officer denied the claim on 18 September 2000 (R4, tab 2).

41. On 22 November 2000, appellant appealed the contracting officer's final decision to this Board, where it was docketed as ASBCA NO. 53168 (R4, tab 1).

42. Following docketing of the appeal, appellant certified its claim to the contracting officer.

43. On 14 May 2001, we dismissed the appeal for lack of jurisdiction because it was not certified when it was submitted to the contracting officer.

44. On 17 July 2001, appellant requested the contracting officer to reconsider the claim (now certified) and the 18 September 2000 final decision (R4, tab 1a).

45. On 30 July 2001, appellant appealed the deemed denial of its claim. The appeal was docketed as ASBCA No. 53471 on 1 August 2001.

46. On 8 August 2001, the contracting officer refused to reconsider the final decision (R4, tab 2a).

47. Appellant has offered no evidence other than its own unsubstantiated assertions, that district personnel terminated DO No. 0003 or declined to exercise the last two option years in the contract due to racial or ethnic discrimination or a desire to get rid of appellant because it was an 8(a) contractor.

CONTENTIONS OF THE PARTIES

Appellant alleges that the aggregate of the actions taken by district personnel, culminating in the convenience termination of DO No. 0003 and the failure to exercise the last two option years in its contract, violated the duty of good faith. In support of this contention, appellant alleges that the district failed to give 8(a) contractors preference in the

selection process and manipulated IDIQ contracts to avoid compliance with the 8(a) program and the Competition in Contracting Act (CICA), 41 U.S.C. § 253(a). Appellant points out that March AFB wanted B&V, a large business, to perform the work and that appellant only received the award because the district was behind in its 8(a) goals. Appellant alleges that Mr. Mercier, one of the district's technical managers, told Mr. Singh, appellant's president, that he could have the work if he agreed to subcontract 90 to 92 percent to B&V. As a result, appellant allegedly selected B&V as its subcontractor. During negotiations with B&V, Mr. Singh alleges that Mr. Linbrunner, the technical manager for March AFB, told him that if he did not finalize the subcontract with B&V, he would not receive any more delivery orders or contracts from the district. Mr. Singh alleges that when he finally came to terms with B&V, Mr. Carter, the SBA Advocate, directed him not to sign the subcontract. Appellant also alleges that the district prevented it from commencing work by failing to issue a NTP after the second round of negotiations. Appellant additionally alleges that the reasons stated in the termination notice were incorrect, and that the district delayed terminating DO No. 0003 for six months. According to appellant, Mr. Haskell, the contracting officer, believed there was a "stigma" attached to 8(a) contractors and that he mistakenly held appellant responsible for its failure to begin work under DO No. 0003. Appellant also points out that the district awarded the follow-on work to Fluor Daniel before terminating DO No. 0003 and that Fluor Daniel subcontracted 80 percent of the work to B&V. After the termination, appellant alleges that Mr. Hussey, who supervised the district's technical managers, opposed

its receipt of more work. Finally, appellant alleges that the district failed to exercise the third and fourth year options or award any more contracts to appellant. Appellant alleges that these actions were motivated by racial and ethnic discrimination and a desire to get rid of appellant because it was an 8(a) contractor.

The district denies that the termination was motivated by racial or ethnic prejudice or that it wanted to get rid of appellant. According to the district, DO No. 0003 was properly terminated because the needs of its customer had changed and appellant was a marginal performer. The district asserts that the option years were not exercised due to a lack of work.

DECISION

Section 605(a) of the Contract Disputes Act (Act), 41 U.S.C. §§ 601-13, limits our jurisdiction to claims "relating to a contract." As a result, we lack jurisdiction over allegations of irregularities in the selection process and misuse of IDIQ contracts. These issues are reserved for other fora. Our jurisdiction is further "circumscribed by the parameters of the claim, the contracting officer's decision thereon, and the contractor's appeal therefrom." *Centurion Electronics Service,* ASBCA No. 51956, 03-1 BCA ¶ 32,097 at 158,657, *quoting Stencel Aero Engineering Corp.,* ASBCA No. 28654, 84-1 BCA ¶ 16,951 at 84,315, *aff'd on recon.*, 03-2 BCA ¶ 32,262, *aff'd,* 95 Fed. Appx. 978 (Fed. Cir. 2004). Given the foregoing parameters, there are two issues before us: (1) whether the district acted in bad faith when it terminated DO No. 0003 for convenience; and (2) whether it acted in bad faith

when it failed to exercise the third and fourth option years in the contract.

Preliminarily, the termination for convenience clause grants the contracting officer broad authority to terminate. This authority has been described as follows:

> In no other area of contract law has one party been given such complete authority to escape from contractual obligations. This clause gives the Government the broad right to terminate without cause . . . .

Cibinic & Nash, ADMINISTRATION OF GOVERNMENT CONTRACTS at 1073 (3d ed. 1995). In view of the broad authority conferred on contracting officers to terminate for convenience, the Court has refused to look into the wisdom of the contracting officer's decision, stating "[i]t is not the province of the courts to decide *de novo* whether termination was the best course." *Salsbury Industries v. United States,* 905 F.2d 1518, 1521 (Fed. Cir. 1990). However, when tainted by bad faith or an abuse of discretion, a termination for convenience results in a breach of contract. *Krygoski Const. Co. v. United States,* 94 F.3d 1537, 1541 (Fed. Cir. 1996).

Government officials are presumed to act in good faith in the performance of their duties. *Librach v. United States,* 147 Ct. Cl. 605, 612 (1959). In order to rebut this presumption, the contractor must present "well-nigh irrefragable proof." *Kalvar Corp., Inc. v. United States,* 543 F.2d 1298, 1392 (Ct. Cl. 1976), *cert. denied,* 434 U.S. 830 (1977). Well-nigh irrefragable

proof requires proof of malice or a specific intent to injure. *E.g., Gadsden v. United States,* 78 F. Supp. 126, 127, 111 Ct. Cl. 487, 489-90 (1948) (actions which are "motivated alone by malice"); *Knotts v. United States,* 121 F. Supp. 630, 636, 128 Ct. Cl. 489, 500 (1954) (proven conspiracy to get rid of the employee); *Struck Constr. Co. v. United States,* 96 Ct. Cl. 186, 222 (1942) (course of governmental conduct that was designedly oppressive); *Apex International Management Services, Inc.,* ASBCA Nos. 38087 *et al.,* 94-2 BCA ¶ 26,842 at 133,549-50 (government specifically intended to injure appellant, conspired to get rid of appellant and engaged in oppressive conduct).

In *Am-Pro Protective Agency, Inc. v. United States,* 281 F.3d 1234 (Fed. Cir. 2002), the Court of Appeals for the Federal Circuit clarified what is meant by well-nigh irrefragable proof, equating it to clear and convincing evidence. The Court defined clear and convincing evidence as "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is '*highly probable.*'" *Id.* at 1239-40 (emphasis in original). Thus, in order to meet its burden of proof, appellant must create in us "an abiding conviction" that the district's actions were motivated by racial or ethnic bias or a specific intent to harm or get rid of appellant because it was an 8(a) contractor.

In determining what weight to give to a piece of evidence, we first assess its probative value. That is, we look to see whether the evidence is reliable and trustworthy. One way to make this determination is to see if there is any contemporaneous documentary evidence corroborating the evidence. In this regard, we

have long held that unsubstantiated assertions do not constitute proof or evidence. *E.g., Maggie's Landscaping, Inc.*, ASBCA Nos. 52462, 52463, 04-2 BCA ¶ 32,647 at 161,569; *M.A. Mortenson Co.*, ASBCA Nos. 53105 *et al.*, 04-2 BCA ¶ 32,713 at 161,845; *Technocratica*, ASBCA Nos. 46567 *et al.*, 99-2 BCA ¶ 30,391 at 150,226; *Grady & Grady, Inc.*, ASBCA No. 48629, 96-1 BCA ¶ 28,025 at 139,917.

Key aspects of appellant's case are based on the unsubstantiated assertions of Mr. Singh. Mr. Singh alleges that Mr. Mercier called him on 21 April 1995 and told him that he could have the delivery order if he agreed to subcontract 90 to 92 percent of the work to B&V. Mr. Mercier did not testify. The only evidence in support of Mr. Singh's assertion is his telephone bill for April/May 1995. The bill reflects a 2.1 minute telephone from appellant to Mr. Mercier on 21 April 1995. (Finding 14) There is no evidence corroborating the substance of the call and Mr. Singh's allegation is inconsistent with his subsequent call to Mr. Linbunner requesting the names of potential subcontractors (finding 17). Mr. Singh also alleges that, during his negotiations with B&V, Mr. Linbrunner told him that if he did not finalize the subcontract with B&V, he would not receive any more delivery orders under this contract. Mr. Linbunner denied this exchange. We found Mr. Linbunner's testimony more credible. (Finding 25) Mr. Singh further alleges that Mr. Carter, the SBA Advocate, directed him not to sign the B&V subcontract. Mr. Carter did not testify and there is no documentary evidence supporting this assertion. (Finding 26) In any event, Mr. Singh subsequently submitted a proposal to perform the work with appellant's own forces (finding 27). Mr. Singh also

alleges that Mr. Hussey blocked appellant's receipt of additional work following the termination. Mr. Hussey denied any animus towards appellant and testified that appellant was considered for additional work. We found that testimony credible. (Finding 38) Appellant's evidence falls far short of establishing bad faith.

The district cited two reasons for terminating DO No. 0003 in its 2 May 1996 termination notice: (1) its customer's needs had changed due to the passage of time; and (2) appellant failed to prosecute the work. Appellant challenges the accuracy of both of these reasons.

With respect to the first reason cited in the termination notice, appellant argues that bioventing, the technology required by the Fluor Daniel delivery order, was not an "innovative" technology as were the technologies required by DO No. 0003. We are unaware of any authority, and appellant has not cited any, for the proposition that the contracting officer must order the same or similar services when it issues a contract to another contractor following a termination for convenience. The bottom line is that, absent bad faith or a clear abuse of discretion, the contracting officer was free to choose whatever technology he thought best suited his customer's needs. *T & M Distributors, Inc. v. United States,* 185 F.3d 1279, 1283 (Fed. Cir. 1999); *Salisbury,* 905 F.2d at 1521, *quoting John Reiner & Co. v. United States,* 163 Ct. Cl. 381 (1963). Beyond innuendo and unsubstantiated assertions, appellant did not offer any evidence that the contracting officer acted in bad faith or abused his discretion by replacing the more expensive methodologies of soil washing and low

thermal desorption with bioventing. Thus, the fact that bioventing was not an innovative technology cannot be used by this Board as a basis for finding the termination for convenience was improper. *Salisbury*, 905 F.2d at 1521.

With respect to the second reason cited in the termination notice, appellant argues that the contracting officer was mistaken in his belief that appellant failed to prosecute the work. According to appellant, it was the district's fault that work on DO No. 0003 never began because no NTP was issued following the second round of negotiations. This argument assumes that the parties reached agreement to modify DO No. 0003 during the second round of negotiations. We have found as fact that they did not reach agreement (finding 27). After the second round of negotiations were terminated, appellant submitted a proposal offering to accept whatever price the district thought was reasonable. The district did not respond to this proposal. Thus, DO No. 0003, as issued on 24 July 1995, was still a valid delivery order and NTP.

Appellant next argues that the termination was invalid because the district delayed terminating DO No. 0003 for six months. The reason for the delay is unclear. Ms. Overgaard, the contract specialist, testified that she did not issue the notice due to a serious protracted illness. However, Mr. Haskell, the contracting officer, testified that he had 10 contract specialists working for him at the time. Regardless of the reason, appellant's remedy was under the termination for convenience clause. While the delay arguably entitled appellant to a time extension, it did

not invalidate the district's right to terminate for convenience.

Appellant next argues that the termination was invalid because the district awarded a delivery order to Fluor Daniel before it terminated DO No. 0003 and Fluor Daniel subcontracted 80 percent of the work to B&V. The mere fact that the contracting officer awarded a delivery order to Fluor Daniel is insufficient to prove bad faith. *See Kalvar*, 543 F.2d at 1302. Moreover, Fluor Daniel was a large business and was not subject to the restrictions of the 8(a) program. On this record, appellant has failed to demonstrate that the award was made in bad faith.

Appellant next alleges that Mr. Haskell admitted there was a "stigma" attached to 8(a) contractors and that he was mistaken about the quality of appellant's performance. What Mr. Haskell said was that many of his customers attached a "stigma" to 8(a) contractors and that he often had difficulty selling an 8(a) contractor to his customers. We have carefully reviewed Mr. Haskell's actions as well as the actions of other district personnel involved with DO No. 0003, and do not find any evidence of racial or ethnic discrimination or a desire to get rid of appellant because it was an 8(a) contractor. While district personnel may not have liked dealing with appellant, that does not prove bad faith. In order to establish bad faith, the "evidence must show with convincing clarity a high probability that [the district] acted from personal animus with specific intent to injure." *Empire Energy Management Systems, Inc.*, ASBCA No. 46741, 03-1 BCA ¶ 32,079 at 158,553, *citing Am-Pro Protective Agency, Inc.*, 281 F3d at 1240, *aff'd*, 362 F.3d 1343

(Fed. Cir. 2004). Appellant has failed to make this showing.

Appellant next argues that the district failed to exercise the third and fourth year options in bad faith. It is established that the exercise of an option is within the broad discretion of the government and that, in order to prevail, a contractor must prove bad faith, an abuse of discretion or that the contracting officer acted in an arbitrary or capricious manner. *Kirk/Marsland Advertising, Inc.*, ASBCA No. 51075, 99-2 BCA ¶ 30,439 at 150,408; *Plum Run, Inc.*, ASBCA Nos. 46091 *et al.*, 97-2 BCA ¶ 29,193 at 145,230. Mr. Haskell, the contracting officer, testified that the district did not have enough work to justify exercising the options and that the decision not to exercise the options was a business decision (finding 37). Other than unsubstantiated allegations and conclusory assertions, appellant has not presented any evidence to the contrary. On this record, we conclude that the district has established a reasonable basis for its decision and that appellant has not proven the elements necessary for relief.

In summary, appellant has not proven that the actions of district personnel, either individually or in the aggregate, were motivated by racial or ethnic bias or a desire to get rid of appellant due to its 8(a) status. At most, this record shows that district personnel did not like dealing with appellant and considered appellant to be a mediocre contractor. This is insufficient to prove bad faith. *Empire Energy*, 03-1 at 158,553.

The appeal is denied.

Dated: 9 March 2006

/s/
ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

/s/
MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

/s/
EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53471, Appeal of IMS Engineers - Architects, P.C., rendered in conformance with the Board's Charter.

Dated: MAR 10 2006

/s/
CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals

APPENDIX B

ARMED SERVICES BOARD OF CONTRACT APPEALS

ASBCA No. 53471

[Filed December 27, 2006]

Appeal of –	)
	)
IMS Engineers - Architects, P.C.	)
	)
Under Contract No. DACW45-94-D0049	)
	)

APPEARANCE FOR THE APPELLANT:
Mr. Iqbal Singh
President

APPEARANCES FOR THE GOVERNMENT:
Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Thomas J. Ingram, Esq.
Engineer Trial Attorney
U.S. Army by Engineer District, Omaha

OPINION BY ADMINISTRATIVE JUDGE TUNKS

Appellant has moved for reconsideration of our decision in *IMS Engineers - Architects, P.C.*, ASBCA No. 53471, 06-1 BCA ¶ 33,231. Familiarity with that

decision is presumed. The government opposes the motion.

In ruling on a motion for reconsideration, the Board looks to see "whether the motion is based upon any newly discovered evidence, errors in our fact findings or legal theories which the Board failed to consider in formulating its original decision." *ITT Avionics Division*, ASBCA Nos. 50403 *et al.*, 03-2 BCA ¶ 32,378 at 160,214. It is not the purpose of a motion for reconsideration to afford the party an opportunity to reargue contentions that have been fully considered and rejected by the Board. *E.g., McDonnell Douglas Electronics Systems Co.*, ASBCA No. 45455, 99-1 BCA ¶ 30,132.

Appellant has not offered any newly discovered evidence or advanced any legal theories that were not considered in our earlier decision. However, it alleges that the findings of fact contain some errors:

Finding 16. We agree that the exact date of the telephone call may be incorrect. Finding 16 is changed to read "[o]n or about 1 May 1995" instead of "[o]n 28 April 1995" (mot. at 4-61; tr. 1/30-31). We are not persuaded, however, that Mr. Linbrunner lied about receiving a telephone call from Mr. Singh requesting the names of potential subcontractors.

Finding 20. Appellant asserts we erred in stating that B&V proposed to perform the work for $795,574 (mot. at 4-74). The copy of B&V's proposal at supplemental Rule 4, tab 129, indicates that the amount of the proposal was $795,574.06. We see no error here.

Finding 22. Appellant argues that we erred in finding that it failed to finalize the B&V subcontract (mot. at 4-75). The record does not contain an executed copy of the subcontract. According to Mr. Linbunner, B&V told him it was "pulling out of this delivery order. . . because they could not come to final terms with IMS" (tr. 1/33-34). Appellant did not call anyone from B&V to testify. As a result, we found that appellant had failed to establish that the subcontract was finalized. We see no error here.

Finding 23. Appellant argues that this finding should be eliminated because the government did not produce a complete copy of Mr. Linbrunner's diary (mot. at 4-75). We found Mr. Linbrunner's testimony that he received numerous telephone calls from Mr. Singh during the negotiations with B&V to be credible and decline to eliminate the finding (tr. 1/32).

Finding 24. Appellant takes exception to the fact that we found Mr. Linbrunner's testimony more credible than Mr. Singh's with respect to a conversation that took place during the B&V negotiations (mot. at 4-76). Accerding to Mr. Singh, Mr. Linbrunner told him that he would not receive another task order under this contract if he did not finalize the subcontract with B&V. Mr. Linbrunner denied the exchange, stating that he could not "direct any contractor or subcontractor who to use and who not to use" (tr. 1/88). We believed Mr. Linbrunner.

Finding 25. Appellant alleges that we erred in finding that it never executed the B&V subcontract (mot. at 4-78). The record does not contain an executed copy of the subcontract. Mr. Linbrunner testified that

B&V told him it was "pulling out of this delivery order . . . because they could not come to final terms with IMS" (tr. 1/33-34). No one from B&V testified. As a result, we concluded that appellant had failed to prove that it executed the B&V subcontract. We see no error in this finding.

Finding 26. Appellant alleges that we erred in finding that the parties failed to reach agreement on the renegotiation of DO No. 0003 on 24 and 26 October 1995 (mot. at 4-79). According to appellant, Mr. Linbrunner, on whose testimony finding 26 is based, lied when he testified that the parties did not reach agreement. We disagree, and find Mr. Linbrunner credible. Appellant submitted a revised proposal on 31 October 1995 which stated that it was willing to accept whatever price the District thought reasonable (R4, tab 130). The District never responded to the revised proposal and never modified DO No. 0003 to reflect the allegedly renegotiated price. On these facts, we found that the parties did not reach agreement on price. We see no error here.

Finding 32. Finding 32 states that appellant did not perform any work under DO No. 0003. Appellant argues that it incurred proposal costs and that it, therefore, performed work under the delivery order (mot. at 4-123). Proposal costs are usually part of the contractor's overhead pool and are not considered to be work under a delivery order. There is no error in finding 32.

Finding 33. Ms. Overgaard testified that she did not terminate DO No. 0003 for convenience for six-months due to "serious medical problems" (tr.

2/110-12). Appellant does not believe her testimony, alleging that the termination was "beyond a shadow of doubt, intentionally delayed" and that it was "an arbitrary, capricious act [which] smacks of racial/ethnic discrimination and flagitious [sic] . . .bad faith" (mot. 4-127, -28). There is not a shred of probative evidence suggesting that the delay in terminating DO No. 0003 was arbitrary or capricious or that it was based on racial/ethnic discrimination or bad faith. Finding 33 is affirmed.

Finding 36. Appellant takes exception to our finding that the District did not have sufficient work to warrant exercising the last two option years (mot. at 4-133). In our opinion, the contracting officer, who provided this testimony, was in a far better position to assess the magnitude of the District's needs for architect engineering services than Mr. Singh and we relied on his testimony (tr. 2/182-83). We find no error in finding 36.

Finding 37. Appellant alleges that we erred in finding that the District considered it for other delivery orders after the termination of DO No. 0003 (mot. at 4-136). Mr. Hussey was Chief of the Environmental Engineering Branch and Mr. Linbunner's supervisor. Although he could not recall any specific delivery orders for which appellant was considered, he testified that appellant would have been considered for other projects because its IDIQ contract had not expired (tr. 1/144-45, 151). We found Mr. Hussey's testimony credible. There is no error in finding 37.

Finding 38. Appellant disagrees with finding 38 which describes the District Manager's investigation of appellant's post-termination allegations of racial and ethnic discrimination (mot. at 4-138). The District Manager concluded that the District was not withholding work on the basis of race or ethnic origin (tr. 1/116). He also concluded that appellant's performance was marginal (tr. 1/116-18). We found the District Manager's testimony credible. Beyond subjective assertions of racial and ethnic discrimination and bad faith, appellant did not offer any objective evidence that the District's actions were motivated by racial/ethnic bias or bad faith. Finding 38 is that not the error.

Finding 47. Finding 47 states that "[a]ppellant has offered no evidence other than its own unsubstantiated assertions, that district personnel terminated DO No. 0003 or declined to exercise the last two option years in the contract due to racial or ethnic discrimination." Appellant argues that it presented 136 documents and that finding 47 is, therefore, wrong (mot. at 4-145). Appellant misses the point. Where a contractor alleges that government officials acted in bad faith, it bears a heavy burden of proof. The contractor must prove its case, not just by a preponderance of the evidence, but by clear and convincing evidence. The Court of Appeals for the Federal Circuit has defined clear and convincing evidence as "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is 'highly probable.'" *Am-Pro Protective Agency, Inc., v. United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002) (emphasis in original). The bottom line is that appellant's evidence simply failed to create in us an "abiding conviction"

that the District's actions were motivated by racial and ethnic bias or bad faith.

We have considered appellant's other contentions, including the argument that the presiding judge rendered an oral decision at the hearing. The judge did not render an oral decision. She suggested that the parties consider settling the appeal and attempted to provide a basis on which such talks could proceed. *E.g., Morris Communications International, Inc.*, ASBCA No. 40276, 94-2 BCA ¶ 26,828. As the government correctly pointed out in its opposition, the Board's comments were intended to offer the government "a basis . . . to settle, if it chose to do so; and further, to express disappointment with the administration of Appellant's contract, the maladoitness of which the Government has conceded" (opp'n at 4). Ultimately, the parties were unable to settle the dispute. As a result, the Board decided the appeal on the basis of the evidence presented at the hearing and the posthearing briefs.

We have considered appellant's remaining contentions. They do not persuade us that our decision was in error. With the exception of the change to finding 16, our original decision is affirmed.

Dated: 27 December 2006

/s/
ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

/s/
MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

/s/
EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53471, Appeal of IMS Engineers - Architects, P.C., rendered in conformance with the Board's Charter.

Dated: DEC 27 2006

/s/
CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals

APPENDIX C

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2007-1261

[Filed April 14, 2008]

IMS ENGINEERS – ARCHITECTS, P.C.,

Appellant,

v.

Pete Green, SECRETARY OF THE ARMY,

Appellee.

Joseph A. Camardo, Jr., Camardo Law Firm, P.C, of Auburn, New York, argued for appellant.

Joan M. Stentiford, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for appellee. With her on the brief were *Jeffrey S. Bucholtz*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Mark A. Melnick*, Assistant Director. Of counsel was *Brian S. Smith*.

Appealed from: Armed Services Board of Contract Appeals

Administrative Judge Elizabeth A. Tunks

Judgment

ON APPEAL from the Armed Services Board of Contract Appeals

in CASE NO(S). 53471

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam (LINN, *Circuit Judge*, CLEVENGER, *Senior Circuit Judge*, and PROST, *Circuit Judge*).

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER
OF THE COURT

DATED APR 14 2008

/s/
Jan Horbaly, Clerk

APPENDIX D

United States Code
Title 41. Public Contracts
Chapter 9. Contract Disputes

41 U.S.C. § 601. Definitions

As used in this chapter--

(1) the term "agency head" means the head and any assistant head of an executive agency, and may "upon the designation by" the head of an executive agency include the chief official of any principal division of the agency;

(2) the term "executive agency" means an executive department as defined in section 101 of Title 5, an independent establishment as defined by section 104 of Title 5 (except that it shall not include the Government Accountability Office), a military department as defined by section 102 of Title 5, and a wholly owned Government corporation as defined by section 9101(3) of Title 31;

(3) the term "contracting officer" means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority;

(4) the term "contractor" means a party to a Government contract other than the Government;

(5) the term "Administrator" means the Administrator for Federal Procurement Policy appointed pursuant to the Office of Federal Procurement Policy Act [41 U.S.C.A. § 401 et seq.];

(6) the terms "agency board" or "agency board of contract appeals" mean--

(A) the Armed Services Board of Contract Appeals established under section 607(a)(1) of this title;

(B) the Civilian Board of Contract Appeals established under section 438 of this title;

(C) the board of contract appeals of the Tennessee Valley Authority; or

(D) the Postal Service Board of Contract Appeals established under 607(c) of this title;

(7) the term "Armed Services Board" means the Armed Services Board of Contract Appeals established under section 607(a)(1) of this title;

(8) the term "Civilian Board" means the Civilian Board of Contract Appeals established under section 438 of this title; and

(9) the term "misrepresentation of fact" means a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to

proper understanding of the matter in hand, made with intent to deceive or mislead.

41 U.S.C. § 602. Applicability of law

(a) Executive agency contracts

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered into by an executive agency for--

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

(b) Tennessee Valley Authority contracts

With respect to contracts of the Tennessee Valley Authority, the provisions of this chapter shall apply only to those contracts which contain a disputes clause requiring that a contract dispute be resolved through an agency administrative process. Notwithstanding any other provision of this chapter, contracts of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system shall be excluded from the chapter.

(c) Foreign government or international organization contracts

This chapter does not apply to a contract with a foreign government, or agency thereof, or international organization, or subsidiary body thereof, if the head of the agency determines that the application of the chapter to the contract would not be in the public interest.

41 U.S.C. § 603. Maritime contracts

Appeals under paragraph (g) of section 607 of this title and suits under section 609 of this title, arising out of maritime contracts, shall be governed by chapter 20 or 22 of Title 46, Appendix, as applicable, to the extent that those chapters are not inconsistent with this chapter.

41 U.S.C. § 604. Fraudulent claims

If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection[1] shall be determined within six years of the commission of such misrepresentation of fact or fraud.

---

[1] So in original. Probably should be "section".

41 U.S.C. § 605. Decision by contracting officer

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

(c) Amount of claim; certification; notification; time of issuance; presumption

(1) A contracting officer shall issue a decision on any submitted claim of $100,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $100,000--

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the tribunal concerned to direct a contracting officer to issue a decision in a specified period of time, as determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

(6) The contracting officer shall have no obligation to render a final decision on any claim of more than $100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the

claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.

(7) The certification required by paragraph (1) may be executed by any person duly authorized to bind the contractor with respect to the claim.

(d) Alternative means of dispute resolution

Notwithstanding any other provision of this chapter, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of Title 5, or other mutually agreeable procedures, for resolving claims. The contractor shall certify the claim when required to do so as provided under subsection (c)(1) of this section or as otherwise required by law. All provisions of subchapter IV of chapter 5 of Title 5 shall apply to such alternative means of dispute resolution.

(e) Termination of authority to engage in alternative means of dispute resolution; savings provision

In any case in which the contracting officer rejects a contractor's request for alternative dispute resolution proceedings, the contracting officer shall provide the contractor with a written explanation, citing one or

more of the conditions in section 572(b) of Title 5 or such other specific reasons that alternative dispute resolution procedures are inappropriate for the resolution of the dispute. In any case in which a contractor rejects a request of an agency for alternative dispute resolution proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

41 U.S.C. § 606. Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

41 U.S.C. § 607. Agency boards of contract appeals

(a) Establishment; consultation; Tennessee Valley Authority

(1) An Armed Services Board of Contract Appeals may be established within the Department of Defense when the Secretary of Defense, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

(2) The Board of Directors of the Tennessee Valley Authority may establish a board of contract appeals for the Authority of an indeterminate number of members.

(b) Appointment of members; chairman; compensation

(1) The members of the Armed Services Board of Contract Appeals shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of Title 5 with an additional requirement that such members shall have had not fewer than five years' experience in public contract law. Full-time members of such Board serving as such on the effective date of this chapter shall be considered qualified. The chairman and vice chairman of such Board shall be designated by the Secretary of Defense from members so appointed. Compensation for the chairman, the vice chairman, and all other members of such Board shall be determined under section 5372a of Title 5.

(2) The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to its agency board of contract appeals established in subsection (a)(2) of this section, and shall designate a chairman of such board. The chairman and all other members of such board shall receive compensation, at the daily equivalent of the rates determined under section 5372a of Title 5 for each day they are engaged in the actual performance of their duties as members of the board.

(c) Appeals; inter-agency arrangements

There is established an agency board of contract appeals to be known as the "Postal Service Board of Contract Appeals". Such board shall have jurisdiction to decide any appeal from a decision of a contracting officer of the United States Postal Service or the Postal Regulatory Commission relative to a contract made by either agency. Such board shall consist of judges appointed by the Postmaster General who shall meet the qualifications of and serve in the same manner as members of the Civilian Board of Contract Appeals. This chapter shall apply to contract disputes before the Postal Service Board of Contract Appeals in the same manner as they apply to contract disputes before the Civilian Board.

(d) Jurisdiction

The Armed Services Board shall have jurisdiction to decide any appeal from a decision of a contracting officer of the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, or the National Aeronautics and Space Administration relative to a contract made by that department or agency. The Civilian Board shall have jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority) relative to a contract made by that agency. Each other

agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer relative to a contract made by its agency. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

(c) Decisions

An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted, and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

(f) Accelerated appeal disposition

The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is $100,000 or less. The accelerated procedure shall be applicable at the sole election of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible, within one hundred and eighty days from the date the contractor elects to utilize such procedure.

(g) Review

(1) The decision of an agency board of contract appeals shall be final, except that--

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of Title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

(2) Notwithstanding the provisions of paragraph (1), the decision of the board of contract appeals of the Tennessee Valley Authority shall be final, except that--

(A) a contractor may appeal such a decision to a United States district court pursuant to the provisions of section 1337 of Title 28, within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) The Tennessee Valley Authority may appeal the decision to a United States district court pursuant to the provisions of section 1337 of Title 28, within one hundred twenty days after the date of the decision in any case.

(3) An award by an arbitrator under this chapter shall be reviewed pursuant to sections 9 through 13

of Title 9, except that the court may set aside or limit any award that is found to violate limitations imposed by Federal statute.

(h), (i) Repealed. Pub.L. 109-163, Div. A, Title VIII, § 847(d)(4), Jan. 6, 2006, 119 Stat. 3394

41 U.S.C. § 608. Small claims

(a) Accelerated disposition of appeals

The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute is $50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), $150,000 or less. The small claims procedure shall be applicable at the sole election of the contractor.

(b) Simplified rules of procedure

The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal thereunder. Such appeals may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulation.

(c) Time of decision

Appeals under the small claims procedure shall be resolved, whenever possible, within one hundred twenty days from the date on which the contractor elects to utilize such procedure.

(d) Finality of decision

A decision against the Government or the contractor reached under the small claims procedure shall be final and conclusive and shall not be set aside except in cases of fraud.

(e) Effect of decision

Administrative determinations and final decisions under this section shall have no value as precedent for future cases under this chapter.

(f) Review of requisite amount in controversy

The Administrator is authorized to review at least every three years, beginning with the third year after November 1, 1978, the dollar amount defined in subsection (a) of this section as a small claim, and based upon economic indexes selected by the Administrator adjust that level accordingly.

41 U.S.C. § 609. Judicial review of board decisions

(a) Actions in United States Court of Federal Claims; district court actions; time for filing

(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

(b) Finality of board decision

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

(c) Remand or retention of case

In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 607 of this title, the court may render an opinion and judgment and remand the case for further action by

the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

(d) Consolidation

If two or more suits arising from one contract are filed in the United States Court of Federal Claims and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Court of Federal Claims may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

(e) Judgments as to fewer than all claims

In any suit filed pursuant to this chapter involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.

(f) Advisory opinions

(1) Whenever an action involving an issue described in paragraph (2) is pending in a district court of the United States, the district court may request a board of contract appeals to provide the court with an advisory opinion on the matters of contract interpretation at issue.

(2) An issue referred to in paragraph (1) is any issue that could be the proper subject of a final decision of a contracting officer appealable under this chapter.

(3) A district court shall direct any request under paragraph (1) to the board of contract appeals having jurisdiction under this chapter to adjudicate appeals of contract claims under the contract or contracts being interpreted by the court.

(4) After receiving a request for an advisory opinion under paragraph (1), a board of contract appeals shall provide the advisory opinion in a timely manner to the district court making the request.

41 U.S.C. § 610. Subpena, discovery, and deposition

A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the agency board through the Attorney General; or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony, or both. Any

failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.

41 U.S.C. § 611. Interest

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

41 U.S.C. § 612. Payment of claims

(a) Judgments

Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of Title 31.

(b) Monetary awards

Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.

(c) Reimbursement

Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided

by section 1304 of Title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.

(d) Tennessee Valley Authority

(1) Notwithstanding the provisions of subsection (a) through (c) of this section, any judgment against the Tennessee Valley Authority on a claim under this chapter shall be paid promptly in accordance with the provisions of section 831h(b) of Title 16.

(2) Notwithstanding the provisions of subsection (a) through (c), any monetary award to a contractor by the board of contract appeals for the Tennessee Valley Authority shall be paid in accordance with the provisions of section 831h(b) of Title 16.

41 U.S.C. § 613. Separability

If any provision of this chapter, or the application of such provision to any persons or circumstances, is held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.